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No. 05-35569

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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GATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NATIONAL WILDLIFE FEDERATION, et al.

Plaintiffs-Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, and

UNITED STATES ARMY CORPS OF ENGINEERS;

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. CV-01-00640-RE

TREATY TRIBES' JOINT *AMICUS CURIAE* BRIEF IN SUPPORT OF THE DISTRICT
COURT'S INJUNCTION, OPINION AND ORDER

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INTRODUCTION

The Columbia River Treaty Tribes join with the Plaintiffs-Appellees in urging this Court to deny the appeal of Federal Defendants-Appellants (the Corps, the Bureau and NOAA Fisheries) seeking to overturn Senior District Court Judge James A. Redden's June 10, 2005 Injunction Order ("Injunction Order"). This order enjoined the Corps to provide spill for Snake River fall Chinook salmon (listed as "threatened" under the Endangered Species Act (ESA)) at federal dams on the Columbia/Snake River and denied the requested flow and drawdown relief. Since the injunction issued, the Corps of Engineers has reached an agreement with the Treaty Tribes, Plaintiffs, and others on an implementation plan for the court ordered 2005 summer spill. *See* Addendum A to this brief.

The District Court is firmly acquainted with the intricacies of this litigation, which has been ongoing for several years. The motion for injunction, the subject of this appeal, was simultaneously pending with motions for summary judgment, providing the court with voluminous record materials for its review. *E.g.* Docket #762, Oregon's Motion for Summary Judgment, 2/11/2005; Docket #834, NWF's Motion for Injunction, 3/21/2005. The District Court granted the spill injunction and denied the flow and drawdown relief, (Transcript at 117 (NWF E.R. 0971)),

only after it had previously issued a thorough 45 page summary judgment opinion with 13 pages of attachments on May 26, 2005. *NWF v. NMFS*, 01-640-RE, Opinion and Order (D. Or. May 26, 2005) (Fed E.R. 925) (“Summary Judgment Opinion”). The court held that NOAA’s 2004 Biological Opinion for the Federal Columbia River Power System (FCRPS or DAMS) was legally flawed in four separate and independent respects, based on the plain language of the Endangered Species Act and its implementing regulations. Summary Judgment Opinion at 15 (Fed E.R. 939). In so doing, the District Court reviewed the status of each of the listed species affected by the FCRPS and found that “[i]t is apparent that the listed species are in serious decline and not evidencing signs of recovery.” Summary Judgment Opinion at 9 (Fed E.R. 933).

Senior District Court Judge James A. Redden has been presiding over this complex proceeding for well over two years. Docket # 378, Record of Order Assigning Redden. The District Court has an expert advisor to assist it in understanding the highly technical reports, studies, and opinions regarding the status of the fish and the impact of the FCRPS.¹ The District Court has become

¹ U.S. District Court Judge Ancer L. Haggerty has upheld the appropriateness of employing a technical advisor in this case involving the ESA and the Federal Columbia River Power System, ruling that:

thoroughly familiar with the issues involving the Endangered Species Act, the status of the salmon, and the impact of the FCRPS during the course of this protracted litigation. In May, 2003, the District Court reviewed an extensive administrative record and held that the 2000 FCRPS BiOp was arbitrary and capricious because it relied on actions that had not undergone section 7 ESA consultation or were not reasonably certain to occur. *NWF v. NMFS*, 254 F. Supp. 2d 1196 (D. Or. 2003). The District Court, at the federal government's request, left the 2000 BiOp in place and remanded it to NOAA to correct its deficiencies. Docket # 439. The District Court established a Steering Committee and quarterly

It is well known that cases brought under the ESA can involve complex technical and scientific matters. Judge Redden has called upon Dr. Horton for the type of advice he has rendered to other judges, including Judges Craig, Marsh, and King. Dr. Horton has been providing technical and scientific services to courts for more than 20 years, and his training, experience, and involvement in cases such as this evidence that he is eminently qualified to serve as the court's technical advisor.

Dr. Horton's role and duties correspond to those contemplated by the Ninth Circuit in *Federal Trade Commission v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004): "The role of a technical advisor is to organize, advise on, and help the court understand relevant scientific evidence. A technical advisor is a tutor who aids the court in understanding the "jargon and theory" relevant to the technical aspects of the evidence." In this case, Dr. Horton helps Judge Redden understand the voluminous and highly technical reports, studies, and opinions regarding the status of the fish and the impact of the FCRPS.

NWF v. NMFS, 01-640-RE, Opinion and Order (D. Or. March 2, 2005) (NWF E.R. 0504).

reporting procedures to update the court and the parties on NOAA's compliance efforts, or lack thereof. Docket # 444, Supplemental Order setting status conference.

During the remand, the federal government's decision to curtail summer spill for salmon required the District Court to enjoin the Corps of Engineers and NOAA from reducing or eliminating summer spill at the FCRPS dams. Docket #602. In a single sentence, the Ninth Circuit denied federal Appellants' request for a stay pending appeal of this decision. *NWF v. NMFS*, No. 04-35673, Order (9th Cir. August 13, 2004).

Many of the underlying biological issues in the District Court's 2004 proceedings on summer spill are the same as those considered by the District Court in 2005, such as the biological benefits of spilling water at the FCRPS dams, the costs of doing so, and the public interest. Many of the witnesses in 2005 submitted declarations in the previous proceedings in this case.

Prior to issuing the injunction that is the subject of this appeal, the District Court provided a full opportunity for the multitude of parties and *amici* to file voluminous briefs and extensive supporting declarations in support of their positions, including detailed biologic and economic declarations which the District Court considered. Even after the legal briefing on the injunction was complete, the

District Court provided the federal government an additional opportunity to file responsive declarations (Docket #991) which the federal government took full advantage of, filing nine declarations (Docket #995, 997-1002, 1004-1005).

The District Court was well-prepared for the hearing on the injunctive relief request, identifying at the outset that it had read the numerous briefs and declarations that had been filed. Transcript at 3, 12 (NWF E.R. 857, 896). During the course of the four hour hearing, the two attorneys for the federal government were provided multiple opportunities to present their arguments to the District Court. Transcript at 7-25, 109-117 (NWF E.R. 861-879, 963-969). As the briefs and the hearing transcript reflect, despite the fact that the 2004 FCRPS BiOp had been held to be legally flawed, neither the Corps, NOAA, nor BOR came forward with substantial measures to improve conditions for fall Chinook salmon during their juvenile migration.

The briefs, the hearing, and the District Court's prior opinions document that NOAA's own scientists have repeatedly acknowledged that fall Chinook salmon are in a deficit situation, that spill provides the best passage route for salmon, and that transporting fall Chinook salmon (ie. taking them out of a hostile river environment and barging them around dams) neither helps nor harms salmon. The administrative record contained documents from the state and tribal fishery co-

managers supporting spill for juvenile fall Chinook salmon. The Plaintiffs' and Treaty Tribes' expert declarations documented this as well.

The District Court did not abuse its discretion or act clearly erroneously in enjoining the Corps to provide spill for ESA-listed Snake River fall Chinook salmon. The Appellants' request urges this Court to make a snap judgment in this very complex case that would contravene the exhaustive review conducted by a District Court that has become directly familiar with these complex issues and that has the benefit of an expert technical advisor to assist it.

Last summer in this case, this Court denied the federal Appellants' request for an emergency stay pending appeal of District Court's decision enjoining the Corps to continue to provide spill for salmon. *NWF v. NMFS*, No. 04-35673, Order (9th Cir. August 13, 2004). The Treaty Tribes urge this Court to deny the federal Appellants' request to overturn the District Court's injunction this year as well.

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ARGUMENT

1. **The District Court properly concluded that injunctive relief is necessary to mitigate the harm to ESA-listed Snake River fall Chinook salmon from the legally flawed 2004 BiOp for the Action Agencies' operation of the FCRPS based on the federal government's own admissions that fall Chinook salmon are in a deficit situation. The District Court properly concluded that spill would mitigate this harm and provide benefits for ESA-listed Snake River fall Chinook.**

Three of the last five years, the amount of “take” imposed by the FCRPS dams on Snake River fall chinook has exceeded the limits permitted by applicable ESA biological opinions. Olney PI Dec. ¶ 24 (NWF E.R. 0566); Olney 2nd PI Dec. ¶ 20 (NWF E.R. 0728). The salmon are already in a deficit situation. *NWF v. NMFS*, 01-640-RE, Opinion and Order at 8 (D. Or. July 29, 2004) (NWF E.R. 0131); *also see* Summary Judgment Opinion at 48-49 (Fed E.R. 325) (summarizing historical, current and projected population trends of Snake River fall Chinook). In 2005, NOAA’s analysis again indicates that the FCRPS dams will again take more than their limit.² In and of itself, this situation should compel remedial action under section 9 of the ESA. Yet, the court found that it did not need to act on this

² The in-river Snake River fall Chinook survival predicted by NMFS' SIMPAS analysis for 2005 is only 3.5%, which is less than the minimum 8% needed to fall within the ITS range. Toole 2nd Dec. Ex 3 (Fed E.R. 472). Contrary to the caption (Fed E.R. 400), the text of paragraphs 21 and 22 in the Toole declaration does not assert that the authorized incidental take is not likely to be exceeded in 2005. Also, *see* Olney 2nd PI Dec. ¶ 20 (NWR E.R. 0728).

basis, since the defendants had failed to comply with the substance and procedures of section 7(a)(2) of the Act. Injunction Order at 3-4 (Fed E.R. 562-3). In so ruling, the court was rightfully concerned about the total magnitude of the mortality imposed by the FCRPS dams and the status of the species. Injunction Order at 8 (Fed E.R. 567).

The District Court found that NOAA's attempt to insulate the "lions share" of the FCRPS' mortality from ESA scrutiny was invalid. Injunction Order at 9 (Fed. E.R. 568). The total mortality imposed by the FRCPS dams has recently exceeded 90% of the juvenile migrating ESA-listed Snake River fall Chinook salmon. Olney 2nd Dec. ¶ 20 (NWF E.R. 0728); *see also* 2004 FCRPS BiOp Table 10.3 (Fed E.R. 948) (describing total FCRPS mortality).³ However, the unlawful jeopardy framework adopted by NOAA and the action agencies recognized only 1-

³ In injunction proceedings in 2004, the District Court previously considered the mortality caused by the FCRPS to Snake River fall Chinook and found that:

NOAA Fisheries has itself documented that the [2000 FCRPS BiOp] has not been implemented as planned and the predicted survival improvements for Snake River fall chinook juveniles have not materialized (see NOAA Estimation of Hydro Performance Standards for Snake River Fall Chinook Salmon, June 20, 2004 (Corps AR at 194-95)). Given that we are working from a deficit situation, we should not be cutting back on an effective mitigation tool [i.e. spill].

NWF v. NMFS 01-640-RE Opinion and Order, pp. 7-8 (D. Or. July 29, 2004) (NWF E.R. 0137-8)

4% of this mortality for purposes of determining jeopardy under the ESA.

Summary Judgment Opinion p. 28 (Fed E.R. 362). In addition, the agencies failed to appropriately consider critical habitat needs of the species. Summary Judgment Opinion at 33, 49 (Fed E.R. 357, 373) (“the 2004 FCRPS BiOp sanctioned further degradation of fall Chinook critical habitat caused by an operation that in NOAA’s words ‘does not make maximum use of spillways, the safest route of in-river passage’”). These considerations were “consigned to the ‘environmental baseline’ and thereby not utilized to form the basis of the required jeopardy analysis and adverse modification decisions.” Injunction Order at 7 (Fed E.R. 566). The District Court properly and clearly found in light of these factors that “the [FCRPS] DAMS strongly contribute to the endangerment of the species and irreparable injury will result if changes are not made.” Injunction Order at 8 (Fed E.R. 567).

To remedy this harm, the District Court ordered controlled spills of water at certain FCRPS dams, finding this “necessary to avoid irreparable harm to juvenile fall chinook.” Injunction Order at 10 (Fed E.R. 569).⁴ The Court’s order also

⁴ The Court had ample evidence throughout the record and from the voluminous briefs and declarations during the proceedings to support its determination that spill was necessary to avoid harm. Even without spill at the

recognized the need for spill, as called for in previous FCRPS BiOps, to allow for a meaningful in-river migration program against which the summer transportation program would be compared. Injunction Order at 9-10 (Fed Er 568-9).⁵ The District Court found that the action agencies' proposed action "would not allow a

SNAKE RIVER DAMS, it is clear that transportation is no better than leaving the fish in the river. Heinith Dec. ¶ 28 (NWF E.R. 0745). Likewise,

[t]he benefits of summer spill for increasing survival of Snake River fall Chinook have been thoroughly documented (Oregon 2000; Oregon 2003; ODFW 2004a; JTS 2004a); therefore, the summer spill reference operation should include spill at collector projects (spring levels). This operation will improve survival of Snake River fall Chinook by increasing spillway passage and reducing the proportion of fish transported.

Oregon Comments at 12 (NWF E.R. 0468). Washington, Idaho, and CRITFC's technical commentary expressed similar views. Washington Comments at 4 (NWF E.R. 0496); Idaho Comments at 8 (NWF E.R. 0414); CRITFC Comments at Attachment A, p.11 (NWF E.R. 394).

⁵ Since 1995, each FCRPS BiOp has called for the evaluation of the biological effects of transporting Snake River fall Chinook compared to the best possible in-river migration conditions, that is with spill at the collector dams on the Snake and Columbia rivers. For instance, Action 46 in the 2000 BiOp directed that the study be initiated in 2001 and include:

spill at Snake River collector Projects to reduce turbine mortality, alternative water management strategies to enhance flows and reduce water temperature, and more intensive predator management.

Olney PI Dec. ¶8 (NWF E.R. 0554) (emphasis added). For the past decade the action agencies have failed to heed such requirements.

meaningful evaluation of the summer transportation program.” Injunction Order at 9 (Fed E.R. 568).

The District Court’s injunction not only protects the species from harm, but it also protects the status quo with which the ESA is concerned; that is the status of Snake River fall Chinook, not the status of the FCRPS. The federal courts have intervened several times to enjoin, wholly or partially, *ongoing* federal activities to protect threatened species and habitats. *E.g. see Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 834 (9th Cir. 2002) (upholding an injunction limiting ongoing grazing activity); *Pacific Coast Fed. of Fishermen’s Ass’ns v. Bureau of Reclamation*, 138 F. Supp.2d 1228, 1249 (N.D. Cal. 2001) (enjoining ongoing irrigation deliveries when flows drop below certain levels). The ESA affords the status of endangered species the “highest of priorities,” and is directed to “halt[ing] and revers[ing] the trend towards species extinction, whatever the cost.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174, 184 (1978).

The District Court’s findings provide a clear understanding of its determination of harm to the listed species. As the Ninth Circuit has graphically described, “[t]o be clearly erroneous, a decision must strike us as wrong with the force of a five-week-old unrefrigerated dead fish.” *Hayes v. Woodford*, 301 F.3d 1054, 1067 n. 8 (9th Cir. 2002 (internal quotation omitted)); *see also Watersheds*

Project v. Hahn, 307 F.3d 815, 834 (9th Cir. 2002) *citing Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir.1998) (Rule 52(a) “exacts neither punctilious detail nor slavish tracing of the claims...”). The District Court’s findings are soundly within the guidelines for an affirmative review.

2. The District Court properly analyzed and concluded the 2004 FCRPS BiOp is legally flawed and that the Action Agencies inappropriately relied on the flawed BiOp in making their separate determinations.

The District Court concluded that, “in light of their reliance on the 2004 BiOp, the Record of Consultation and Statement of Decision (ROD) issued by the Corps ..., and ROD issued by the BOR...also violate the ESA.” Injunction Order at 6 (Fed E.R. 565). The Court provided a well-considered analysis in support of this conclusion. The District Court found that the Agencies relied on the 2004 FCRPS BiOp and did not provide an independent rationale in reaching their ROD determinations. *Id.* The Court also found that the Agencies ignored substantial data in the 2004 BiOp itself, which demonstrated harm to the species. Injunction Order at 7 (Fed E.R. 566). The District Court’s findings are further supported by record evidence showing the extensive participation of the Action Agencies in the development of the 2004 BiOp. *See* NWF E.R. 0578-0605.

The District Court held that agencies are not entitled to rely on and are not protected by their reliance on the flawed 2004 FCRPS BiOp, which is facially invalid. Injunction Order at 7 (Fed E.R. 566). The District Court correctly addressed *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410 (9th Cir. 1990) and *Northwest Environmental Advocates v. EPA*, 268 F.Supp.2d 1255, 1274 (D.Or. 2003). In *Pyramid Lake*, the Navy relied on a *valid* biological opinion issued by the U.S. Fish and Wildlife Service. The *Pyramid Lake* court determined that the Navy's reliance was not arbitrary and capricious, when the Tribe failed to put forth new information demonstrating that the Navy's reliance was arbitrary. 898 F.2d at 1415. Here the Action Agencies have relied on an *invalid* biological opinion and have provided no new information in their records of decision or to the District Court to demonstrate that their reliance was not arbitrary and capricious. The Agencies' actions doubly fail. They have an independent duty under section 7(a)(2) of the ESA to assure that their actions will not jeopardize a listed species. *Id. citing Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1459-60 (9th Cir.1984), *cert. denied*, 471 U.S. 1108, 105 S.Ct. 2344, 85 L.Ed.2d 859 (1985). By relying on an arbitrary and capricious biological opinion and embracing the same infirmities found in that biological opinion, the agencies have failed this duty. Injunction Order p.6 (Fed E.R. 565); *Northwest Environmental*

Advocates 268 F. Supp. 2d at 1274 (EPA's decision to approve Oregon's standards notwithstanding extensive evidence in the record indicating that the criteria were harmful to the threatened species and in reliance on NMFS's facially arbitrary no-jeopardy determination was struck down).

The District Court carefully analyzed the record and adequately explained its findings. The District Court's findings must not be set aside unless the reviewing court is left with a definite and firm conviction that a mistake has been made.

Easley v. Cromartie, 532 U.S. 234, 242 (2001). "To be clearly erroneous, a decision must strike us as wrong with the force of a five-week-old unrefrigerated dead fish." *Hayes v. Woodford*, 301 F.3d 1054, 1067 n. 8 (9th Cir. 2002 (internal quotation omitted)). This, the District Court's decision is not. The District Court's findings are sound.

The Action Agencies' inappropriate reliance on the 2004 BiOp is underscored by the District Court's summary judgment opinion, where it found that the 2004 BiOp was fatally flawed in four respects: "(1) the improper segregation of the elements of the proposed action NOAA deems to be nondiscretionary; (2) the comparison, rather than aggregation, of the effects of the proposed action; (3) the flawed critical habitat determinations; and (4) the failure to consult adequately on both recovery and survival in the jeopardy

determination.” Summary Judgment Opinion at 15 (Fed E.R. 339). Each of these flaws would need to be separately overcome for the Appellants to demonstrate that the District Court abused its discretion. It is highly unlikely that they can do so.

For each legal flaw of the BiOp, the District Court examined the ESA, its implementing regulations, and the case law in reaching its conclusion. For example, in finding that NOAA may not segregate nondiscretionary impacts of the action for purposes of analysis, the District Court reviewed the plain language of the regulations, finding the “plain language of [section] 402.03 does not eliminate consultation in situations where there is some meaningful discretionary involvement or control in the action.” Summary Judgment Opinion at 16, n.6 (Fed E.R. 340). The Court notes that the agencies have the “considerable discretion in their administration of the [FCRPS] systems.” Summary Judgment Opinion at 21 (Fed E.R. 345). The Court also reviewed the case law and found that it “does not support NOAA's new approach” and that NOAA's interpretation “would create a second exemption far broader than the only one thus far created by Congress.” Summary Judgment Opinion at 17, 22 (Fed E.R. 341, 346). “[T]he ESA requires the biological opinion to analyze the effect of the **entire** agency action.” *Conner v. Burford*, 8484 F.2d 1441, 1454 (9th Cir. 1988) (emphasis in original).” Summary Judgment Opinion at 23 (Fed E.R. 347). The District Court conducted similarly

careful analyses of the statute, the regulations, and the case law in reaching each of its other three conclusions.

The District Court also held that NOAA's newly formed interpretations of the ESA and regulations were entitled to "only limited deference" due to the significant departure of the 2004 BiOp from the long-standing practices evidenced in the 1995 and 2000 BiOps and from previous regulatory interpretations. Summary Judgment Opinion at 24 ("NOAA has not demonstrated a reasonable rationale" for departing from past interpretations and now segregating the action), 29 (NOAA's current interpretation conflicted with earlier ones that called for aggregation of baseline effects), 35 (regarding omission of recovery) (Fed E.R. 248, 353, 359). "When an agency's new interpretation of a regulation conflicts with its earlier interpretations, the agency is 'entitled to considerably less deference' than a consistently-held agency view. *Immigration and Naturalization Services v. Cardoza-Fonseca*, 480 U.S. [421,] 446 n.30 [(1987)]." Summary Judgment Opinion at 24 (Fed E.R. 348).

The ESA reflects "[t]he plain intent of Congress to halt the trend towards species extinction, whatever the cost" and "the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *TVA v. Hill*, 437

U.S. 153, 184, 185 (1978); Summary Judgment Opinion at 11-12 (Fed E.R. 335-6).

In light of the ESA, the District Court explicitly considered the historical, current, and projected population trends for the listed species, taken from NOAA's 1995, 2000, 2004 BiOps and the Biological Review Team report. Summary Judgment Opinion at Attachment 1.

The District Court's summary judgment and injunction opinions are solidly based on the ESA, its implementing regulations, the case law, and the status of the runs. In order to prevail on appeal, the Appellants will have to show that the district court erred in each of its four conclusions. Consequently, there is little likelihood that Appellants will prevail on appeal.

3. The District Court properly considered the “public interest” before enjoining the Corps to provide spill for ESA-listed Snake River fall Chinook. The “public interest” weighs strongly in favor of denying the requested stay.

The District Court did not abuse its discretion in enjoining operations that continue a deficit salmon survival condition. The District Court was (and is) very concerned about fashioning an equitable remedy that will protect the salmon and assure compliance with the ESA. Injunction Order at 9-11 (Fed E.R. 568-570) (urging parties to reach consensus on spill operations). The Court has the

discretion to fashion relief to assure the survivability of the affected salmon and as equity demands. *See NWF v. NMFS*, 01-640-RE, Opinion and Order (D. Or. July 1, 2003) (NWF E.R. 0001) (remanding, but not vacating, the 2000 FCRPS BiOp). More broadly, the district court heard and acknowledged the lengthy argument that the federal government agencies, States, tribes, Plaintiffs and others should fashion a solution to for the impacts of the FCRPS dams and their compliance with the ESA:

I agree with counsel from Washington 100 percent that this is not an insoluble problem. It can be resolved. I thought it when I remanded the 2000. And I still think it. But I think I've got to have a lot more help from the agencies, from the plaintiffs and from everyone else. To stop this idea of my way or else and get down to what really will work, and it can be done, and you are the people that are going to have to do it.

Transcript p. 119 (NWF E.R. 973). The District Court has fashioned a remedy designed to commit the parties to the proceeding to developing solutions. In 2003, the court's remand to NOAA was "pretty general." Transcript at 118 (NWF E.R. 972). That remand didn't work. Although the court hoped the parties would fashion a solution, "they never got there." Transcript at 38 (NWF E.R. 892); *see* Summary Judgment Opinion at 5-7 (Fed E.R. 329-31)(discussing failings of the remand proceedings on the 2000 FCRPS BiOp). Instead, NOAA and the action

agencies attempted to redefine their obligations under the ESA to simply avoid the consequences of most of the salmon mortality imposed by the FCRPS dams.

The public interest favors compliance with the Endangered Species Act. The court had extensive information before it concerning the economic and other consequences of the Plaintiffs' requested relief. *See* Niemi Dec. and Sheets Dec. (NWF E.R. 0617, 0634) (discussing economic considerations related to the proposed injunctive relief and responding to federal defendants' declarations). As the NWF demonstrated, the Pacific Northwest enjoys some of the nation's lowest cost electricity supply. Niemi Dec. ¶ 9 (NWF E.R. 0620). Even after a 50% increase in its power rates following the 2001 West Coast energy crisis, BPA's wholesale power rates is approximately 40% below market.⁶ After implementing the spill required by the district court, BPA's wholesale power rates still will be approximately more than 36% below market. Sheets Dec. ¶ 12 (NWF E.R. 0710).

⁶ In 2001, BPA faced the unprecedented circumstance of very low streamflows limiting its generation supply and extraordinarily high market prices for purchased power. *Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924 (9th Cir. 2002). BPA responded among other ways by curtailing spill for salmon, but developing measures "to offset *any* impacts of the emergency operations." *Id.* at 932-33 (emphasis added). Contrary to BPA's record of decision upon which the Ninth Circuit relied in *Umatilla*, the fish mitigation measures BPA promised did not materialize. BPA chose not to proceed with the mitigation projects recommended by the region. Instead, BPA cut its fish and wildlife budgets in 2002 and 2003 by approximately \$80 million. CRITFC Comments on 2004 BiOp, at Attachment A, pp. 27-29 (NWF E.R. 402-404).

The court was concerned with the economic information regarding the consequences of spill, the Bonneville Power Administration's wholesale power rates, and regional politics. Transcript at 5 (NWF E.R. 0859). But, as the court found, these considerations are secondary to the welfare of the species whose existence is imperiled. 2005 Injunction Order at 9 (Fed Appellants' Att. A) *citing* *National Wildlife Fed. v. NMFS*, 235 F.Supp.2d 1143, 1161(W.D. Wa. 2002); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987). Protecting species listed under the Endangered Species Act is in the public interest, including the interests of the Treaty Tribes. *See United States v. Winans* 198 U.S. 371, 380-81 (1905)(the right to take fish is "not much less important to the existence of the Indians than the atmosphere they breathed").⁷

/// /// ///

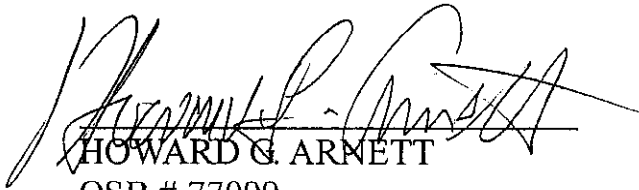
⁷ It is also in the public interest as represented by the Pacific Salmon Treaty between the United States and Canada. This treaty calls for the countries to use their best efforts to "protect and restore habitat to promote safe passage of adult and juvenile salmon and achieve high levels of natural production." Habitat and Restoration, Annex IV, Chapter 7, Attachment E, 1999 Agreement (Exchange of diplomatic notes, June 30, 1999), Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, Treaty Doc. No. 99-2 (entered into force March 18, 1985). <http://www.psc.org/pubs/Treaty.pdf>.

CONCLUSION

Since the injunction was issued, the Corps of Engineers has reached an agreement with the Treaty Tribes, Plaintiffs, and others on an implementation plan for the court ordered 2004 summer spill. (Addendum A to this Brief). The implementation plan effectively addresses the dissolved gas and study related concerns previously identified by the defendant and defendant-intervenors. *Id.* The court's order is being successfully implemented and is in the public interest. The District Court's order transgresses none of the standards by which its actions are judged on appeal. Instead, the District Court properly exercised its equitable discretion. The Treaty Tribes respectfully request this Court to affirm the District Court's order.

DATED this 30th day of June, 2005.

Respectfully submitted,

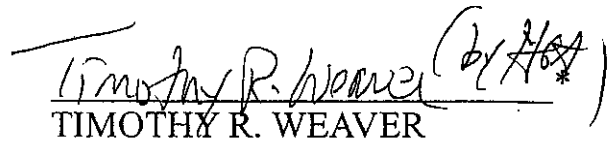

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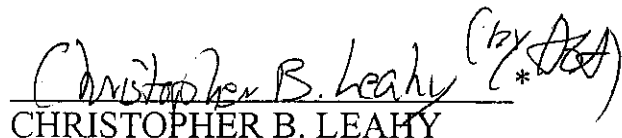

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Addendum A

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.)

Plaintiffs,)

v.)

NATIONAL MARINE FISHERIES)
SERVICE,)

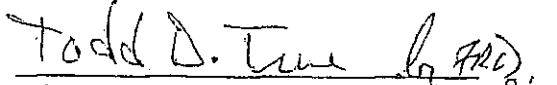
Defendant.)

Civ. No. 01-00640-RE

**REPORT TO COURT
ON SPILL PLAN UNDER
COURT'S ORDER OF
JUNE 10, 2005**

Come now the National Marine Fisheries Service, U.S. Army Corps of Engineers (Corps), and the U.S. Bureau of Reclamation (BOR), Defendants herein, and National Wildlife Federation, et al., Plaintiffs herein, and as specified in this Court's Order of June 10, 2005 (at page 11), respectfully advise the Court that an agreement has been reached as to the specific measures (Plan) to be taken to comply with the Spill provisions of that Order. Attached hereto, as Exhibit A, is a true and correct copy of the agreed upon provisions. This Plan has also been agreed to by the Amicus Treaty Tribes.

Respectfully Submitted, this the 17th Day of June, 2005:

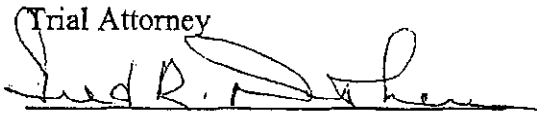

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CERTIFICATE OF SERVICE

I certify that on June 15, 2005, the foregoing "Federal Defendants' Request for Security Bond" will be filed with the Court's electronic court filing system, which will generate automatic service upon those subscribed to receive it. The following will be served by first-class mail and, where an electronic mail address is available, by e-mail):

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United States Army Corps of Engineers, Northwestern Division

Court Ordered Summer Spill Implementation Plan
June 16, 2005

Judge Redden's June 10, 2005 opinion in *NWF v. NMFS* granted in part NWF's requested injunctive relief and ordered the Corps to:

- (1) Provide spill from June 20, 2005, through August 31, 2005, of all water in excess of that required for station service, on a 24-hour basis, at the Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams on the lower Snake River; and
- (2) Provide spill from July 1, 2005, through August 31, 2005, of all flow above 50,000, on a 24-hour basis, at the McNary Dam on the Columbia River.

Judge Redden further "encourage[d] the parties to engage in discussions to reach a consensus on issues of spill, and to advise [him] if one is reached during the period covered by [his] 2005 summer spill order. Otherwise, the spill shall proceed in accordance with this order."

In response to the Judge's suggestion to engage in discussions to reach consensus on implementation of his ordered summer spill, the Corps proposed utilizing the existing Regional Forum committees to coordinate with the plaintiffs, states, tribes and federal agencies (parties) to initiate implementation of the summer spill program. The Corps identified three issues that needed coordination for the implementation of the court ordered summer spill at Lower Granite, Little Goose, Lower Monumental, Ice Harbor and McNary Dams (projects). These areas included Total Dissolved Gas (TDG), biological research, and spill pattern development.

Based on the Corps' coordination within the Regional Forum there are some proposed modifications to the order. The Corps proposes to operate the projects to stay within the state water quality standards for TDG, as modified by state variances. Further, the Corps is proposing to implement the planned biological research testing as described below, which will only slightly modify operations ordered by the court. Finally, the Corps plans to utilize spill patterns that have been developed within the Regional Forum, however, additional efforts on spill pattern development for Lower Granite, Little Goose and Lower Monumental are planned for the week of June 20 – 25, 2005 that may slightly modify the initial spill patterns. The new spill patterns will be coordinated through the Regional Forum before they are adopted.

These adjustments will enable the action agencies and others to obtain additional information on fall Chinook passage and in the Corps' opinion should improve juvenile survival over the operations ordered by the court. General agreement was reached with the agencies and Tribes through the Regional Forum for these actions. The following is a

more detailed description of the Corps proposed operation for implementation of the court ordered spill operation.

Total Dissolved Gas:

The court ordered spill program did not address the issue of TDG and the potential exceedance of the Oregon and Washington State variances to the water quality standards (120/115% TDG). In order to reach consensus on how to implement the summer spill operation, the Corps coordinated with the parties in the Regional Forum's Water Quality Team (WQT), and Technical Management Team (TMT).

Following the coordination process that took place this week in the Regional Forum, we have developed recommendations that reflect the discussions.

Recommended Summer Spill Implementation to meet TDG Standards

Spill is scheduled to begin June 20, 2005, at Lower Granite, Little Goose, Lower Monumental, and continue at Ice Harbor. McNary summer spill is scheduled to begin July 1, 2005. The Corps will begin spill on the scheduled dates. The Corps' proposed implementation and continuation of the summer spill is detailed below.

Spill will start at Lower Granite, Little Goose, Lower Monumental, and Ice Harbor immediately after midnight Sunday night (i.e. 0001 hours June 20). Using the Corps' hydrologic model, the expected flow in the lower Snake River on June 20 may be near 38,000 cubic feet per second (cfs). The Corps will operate the powerhouses at the four lower Snake River dams at the low end of the 1% peak efficiency range on one generating unit. This is approximately 11,500 cfs at Lower Granite, Little Goose, and Lower Monumental; and 9,500 cfs at Ice Harbor. Each powerhouse will operate within 1% of peak efficiency to comply with coordinated fish measures as shown in the 2005 Fish Passage Plan. The 1% peak efficiency flow represents the court ordered "station service" flow as characterized in the Pettit declaration (para. 46).

On June 15, 2005, the TMT discussed the start of the spill operation and the relationship of spill to TDG. All members of the TMT present agreed that during the summer spill operation, the Corps should meet the TDG levels as defined by the variances provided by Washington and Oregon. The daily 12-hour maximum allowable TDG is 120% in the tailrace of a dam, and 115% in the forebay of the next dam downstream. Once either limit is met, the Corps will reduce spill at the upstream dam to reduce TDG levels consistent with the state TDG variances.

The court order states that projects will spill this summer in excess of station service at Lower Granite, Little Goose, Lower Monumental, and Ice Harbor. Based on the Corps' analysis, spill in excess of station service at Lower Granite, Little Goose, and Ice Harbor is expected to be consistent with state TDG standards; but, Lower Monumental spill will begin at a lesser amount. This is because the Corps' SYSTDG modeling illustrated that with total river flow near 38,000 cfs, where 11,500 cfs is used for generation and 26,500 cfs is spilled, TDG at the Lower Monumental tailrace is

expected to exceed 120%. Based on model results and past experience with spill and TDG, the Corps will start spill at 12,000 cfs which should generate TDG closer to 120% TDG. If the TDG is less than 120% TDG, the spill will be incrementally increased. If the TDG is greater than 120%, the spill will be reduced. Based on total river flow of about 38,000 cfs, the Snake River starting spill quantities and potential resultant TDG in the tailrace of the dam is shown.

Dam	Total Flow (cfs)	Flow through the Powerhouse (cfs)	Spill (cfs)	TDG Tailrace
Lower Granite	38,000	11,500	26,500*1	113%
Little Goose	38,000	11,500	26,500	114%
Lower Monumental	38,000	26,000	12,000	120%
Ice Harbor	38,000	9,500	28,500*2	115%

*1 – Lower Granite may be adjusted based on RSW testing plan

*2 – Ice Harbor may be adjusted based on RSW testing plan

The Corps plans to monitor TDG at all projects. For Lower Monumental, the Corps will utilize this monitoring to adjust spill as needed. The resultant TDG from the start of spill will be available on the Corps web page <http://www.nwd-wc.usace.army.mil/report/total.html> by about 6:00 a.m. June 20. These data will be evaluated during the first day of spill to determine if adjustments are needed to Lower Monumental spill to meet the TDG objective of 120% in the tailrace. Resultant TDG will be posted on the web page again at about 12:00 p.m. and 6:00 p.m. on June 20. The Corps will monitor TDG through the day and determine if adjustment are needed to the total spill at Lower Monumental. The goal of this operation is to implement a spill amount that will be near the TDG limit, but will not immediately exceed the limit.

At McNary Dam, the court order calls for spill from July 1, 2005 through August 31, 2005 of all flows above 50,000 cfs. Spill according to the court order will start at McNary on July 1 at 0001 hours, or just after midnight. Based on a projected total river flow of 168,000 cfs, the initial spill at McNary would be 118,000 cfs. The expected TDG in the tailrace of McNary is near 119%, which is within the state variance to the water quality standards.

Summer Monitoring and Adjustment Strategy

The Corps monitors TDG in the lower Snake and lower Columbia rivers every day and adjusts spill at dams to get as close as possible to the state standards of 120% in the tailrace or 115% in the next forebay without exceeding these objectives. As flows recede in the summer, tailwater elevations drop and TDG levels increase. For this reason, spill may need to be stopped at Lower Monumental for several hours of a day, or for several days, if the TDG exceeds the standards to allow the TDG in the river to equilibrate before beginning spill again.

From June 20 through August 31 there may be short durations when generation at lower Snake River dams may be zero and all flow is spilled. Zero power generation may

be the result of lack of regional power demand, or the result of voltage stability needs in the transmission system. Zero power generation is most likely to occur at Ice Harbor Dam from midnight through 4:00 a.m. because of lack of power demand. If Ice Harbor, or any lower Snake dam, reduces to zero powerhouse generation, the Corps will monitor the resultant TDG and adjust spill as needed to remain within variances to the water quality standards.

2005 Spill Research Summary

The Corps and the regional agencies and Tribes are interested in maintaining the existing spill research planned at Lower Granite, Ice Harbor, and McNary Dam projects. In addition, we would like to better understand project survival associated with summer spill at Little Goose, and Lower Monumental Dams. The Corps met with the Studies Review Work Group (SRWG) on June 13, 2005 and discussed the studies in question as well as additional studies at Little Goose and Lower Monumental dams. The SRWG agreed to move forward with studies and the proposed operation detailed as follows:

Summer Research Operations

Lower Granite

Revised Summer 2005 Objectives: Compare the performance and survival of RSW operation to normal bay spill to the TDG cap. Radio telemetry and hydroacoustics are the methodologies being used for this evaluation.

Spill Duration: June 20 - August 31

Study Duration: June 21 – July 21

Spill Pattern During Study Period (June 21 – July 11): The study design is an alternating pattern of RSW spill and BiOp spring spill to the TDG cap. Because spill patterns have not been fully developed for the low river flow operations at Lower Granite, the SRWG team will be traveling to ERDC on June 20th to model summer spill patterns. Until this information is available, the gas cap pattern will be based on the pattern developed from the spring spill pattern in Table 1. The tentative spill patterns for the RSW and Gas Cap spill are provided in Table 1. These patterns will be alternated in accordance with the schedule provided in Table 2.

Table 1.
Lower Granite "RSW" operation for Summer, 2005.

Project Discharge	Turbine units						Spillbays								Total Spill
	1	2	3	4	5	6	1	2	3	4	5	6	7	8	
23.8			12				6.7	1.7	0	1.7	0	1.7	0	0	11.8
25.5			12				6.7	1.7	0	1.7	0	1.7	0	1.7	13.5
27.2			12				6.7	1.7	0	1.7	0	1.7	1.7	1.7	15.2

28.9	12	6.7	1.7	1.7	1.7	0	1.7	1.7	1.7	16.9
30.6	12	6.7	1.7	1.7	1.7	1.7	1.7	1.7	1.7	18.6
34.6	16	6.7	1.7	1.7	1.7	1.7	1.7	1.7	1.7	18.6
39.6	21	6.7	1.7	1.7	1.7	1.7	1.7	1.7	1.7	18.6
42.6	12 12	6.7	1.7	1.7	1.7	1.7	1.7	1.7	1.7	18.6
44.6	13 13	6.7	1.7	1.7	1.7	1.7	1.7	1.7	1.7	18.6

At total discharges between 39.6 kcfs and 42.6 kcfs, unit 2 may have to be turned on and off periodically to maintain forebay levels and desired spill discharges.

Lower Granite tentative "Gas Cap Spill" operation for Summer, 2005.

Project Discharge	Turbine units						Spillbays								Total Spill
	1	2	3	4	5	6	1	2	3	4	5	6	7	8	
23.9	12						0	6.8	1.7	0	1.7	0	1.7	0	11.9
25.6	12						0	6.8	1.7	0	1.7	0	1.7	1.7	13.6
27.3	12						0	6.8	1.7	0	1.7	1.7	1.7	1.7	15.3
29	12						0	6.8	1.7	1.7	1.7	1.7	1.7	1.7	17
30.8	12						0	6.8	1.7	1.7	3.5	1.7	1.7	1.7	18.8
32.6	12						0	6.8	3.5	1.7	3.5	1.7	1.7	1.7	20.6
34.4	12						0	6.8	3.5	1.7	3.5	1.7	3.5	1.7	22.4
36.2	12						0	6.8	3.5	3.5	3.5	1.7	3.5	1.7	24.2
38	12						0	6.8	3.5	3.5	3.5	3.5	3.5	1.7	26
39.8	12						0	6.8	3.5	3.5	3.5	3.5	3.5	3.5	27.8
41.5	12						0	6.8	3.5	3.5	5.2	3.5	3.5	3.5	29.5
43.2	12						0	6.8	5.2	3.5	5.2	3.5	3.5	3.5	31.2

The gas cap pattern will be evaluated at ERDC; results of the modeling will be coordinated with the region.

Table 2.

Lower Granite study design treatment dates.

Date	Block	Treatment	Date	Block	Treatment
6/20/2005	1	Spill	7/6/2005	9	RSW
6/21/2005	1	RSW	7/7/2005	9	Spill
6/22/2005	2	RSW	7/8/2005	10	Spill
6/23/2005	2	Spill	7/9/2005	10	RSW
6/24/2005	3	Spill	7/10/2005	11	RSW
6/25/2005	3	RSW	7/11/2005	11	Spill
6/26/2005	4	Spill	7/12/2005	12	Spill
6/27/2005	4	RSW	7/13/2005	12	RSW
6/28/2005	5	RSW	7/14/2005	13	Spill
6/29/2005	5	Spill	7/15/2005	13	RSW

6/30/2005	6	Spill	7/16/2005	14	RSW
7/1/2005	6	RSW	7/17/2005	14	Spill
7/2/2005	7	Spill	7/18/2005	15	RSW
7/3/2005	7	RSW	7/19/2005	15	Spill
7/4/2005	8	RSW	7/20/2005	Extra	RSW
7/5/2005	8	Spill	7/21/2005	Extra	Spill

Operation Considerations:

General:

- Units 1-3 have a much wider band of operation that is within 1% of peak efficiency, so use units 2 and 3 during the test (unit 1 is out of service). Lower limit for these units is 11.9 kcfs and upper limit is 21.0 kcfs (at 100 foot head).
- Inflow during the evaluation is expected to range from 28 kcfs to 40 kcfs.
- Keep operations as constant as possible.
- Start the test with the spring RSW pattern (Table 1) and the Spill to the Gas Cap pattern (Table 1) in accordance to the randomized block design (Table 2). After observation of the Lower Granite model at ERDC the week of June 20, the Gas Cap pattern may be revised. A summary of the changes to the patterns will be provided by June 23rd and coordinated through the TMT.

For the RSW Treatment:

- If inflow is above 40 kcfs, operate units 2 and 3 (requires approximately 24 kcfs to operate both units), and keep spill levels constant by varying between 1 and 2 unit operation during the day.
- If inflow is below 40 kcfs, operate just unit 3, or unit 2, depending on modeling results at ERDC.
- If inflow falls below 31 kcfs, then spill will have to be reduced to keep one unit operating at minimum (~12 kcfs). So, when inflow is below 31 kcfs, gradually drop spill for the RSW treatment to a minimum of 12 kcfs. See Table 1.

Spill Pattern After Study Period (July 21 – August 31): Under spill to the TDG cap with the minimum of one unit operation at about 11.5 kcfs, the spill pattern will be the RSW pattern developed for the study. See Table 1.

Little Goose

New Summer 2005 Objectives: Estimate reach and project survival of fall Chinook through Little Goose Dam under the revised summer 2005 operation using radio telemetry.

Spill Duration: June 20 - August 31

Study Duration: June 21 – July 11

Spill Pattern During Study Period (June 21 – July 11): The operation is based on spill to the gas cap with one unit of operation within the 1% turbine efficiency operating range, estimated at 11.5 kcfs. The spill pattern for this operation under the low summer flows will be reviewed during the first week of the operation (June 20th) by the SRWG modeling of pattern at ERDC. Until new information is available the spring pattern provided in the Fish Passage Plan will be used. **See Table 3.**

Spill Pattern After Study Period (July 12 – August 31): The same spill pattern used during the study will continue through August 31.

Table 3.
Little Goose Tentative Summer Spill
Pattern, 2005 Operation Based on the Fish
Passage Plan

Project Discharge (kcfs)	Powerhouse (kcfs)	Spillbays (stops)								Total Spill (kcfs)
		1	2	3	4	5	6	7	8	
13.3	11.5	0	1	0					0	1.8
15.1	11.5	0	1	1	0				0	3.6
17.0	11.5	0	1	1	1	0			0	5.5
18.8	11.5	0	1	1	1	1	0		0	7.3
20.6	11.5	0	1	1	1	1	1	0	0	9.1
22.4	11.5	0	1	1	1	1	1	1	0	10.9
24.4	11.5	0	2	1	1	1	1	1	0	12.9
26.3	11.5	0	2	2	1	1	1	1	0	14.8
28.3	11.5	0	2	2	2	1	1	1	0	16.8
30.3	11.5	0	2	2	2	2	1	1	0	18.8
32.2	11.5	0	2	2	2	2	2	1	0	20.7
34.2	11.5	0	2	2	2	2	2	2	0	22.7
36.2	11.5	0	3	2	2	2	2	2	0	24.7
38.3	11.5	0	3	3	2	2	2	2	0	26.8
40.4	11.5	0	3	3	3	2	2	2	0	28.9
42.4	11.5	0	3	3	3	3	2	2	0	30.9
44.5	11.5	0	3	3	3	3	3	2	0	33.0

Lower Monumental

New Summer 2005 Objectives: Estimate reach and project survival of fall Chinook through Lower Monumental Dam under the revised summer 2005 operation using radio telemetry.

Spill Duration: June 20 - August 31

Study Duration: July 5 – July 15

Spill Pattern During Study Period (July 5 - July 15): The operation is bulk spill to the gas cap with a minimum of one unit of operation within the 1% turbine efficiency operating range, estimated at 11.5 kcfs. The spill pattern for this operation under the low summer flows will be reviewed during the first week of the operation (June 20th) by the SRWG modeling of pattern at ERDC. Until new information is available the spill pattern will be based on the large gate opening spill pattern used in the 2004 bulk spill evaluation. **See Table 4.**

Spill Pattern Before and After the Study Period (June 20 – July 4 and July 16 – August 31): The same spill pattern used during the study will continued through August 31.

Table 4.
Lower Monumental Tentative Summer Spill Pattern,
2005 Operation, Based on the 2005 Involuntary Spill

Project Discharge (kcfs)	Powerhouse (kcfs)	Spillbays (stops)								Total Spill (kcfs)
		1	2	3	4	5	6	7	8	
19.4	11.5	0						5	0	7.9
21.1	11.5	0						6	0	9.6
22.8	11.5	0		0				7	0	11.3
27.3	11.5	0		5				5	0	15.8
29.0	11.5	0		5				6	0	17.5
30.7	11.5	0		6				6	0	19.2
32.4	11.5	0		6				7	0	20.9
34.1	11.5	0		7		0		7	0	22.6
35.2	11.5	0		5		5		5	0	23.7
36.9	11.5	0		5		5.5		5.5	0	25.4
38.6	11.5	0		5.5		5.5		6	0	27.1
40.3	11.5	0		6		6		6	0	28.8
42.0	11.5	0		6		6.5		6.5	0	30.5
43.7	11.5	0		6		7		7	0	32.2
45.4	11.5	0		7		7		7	0	33.9

Note: TDG may be an issue at the project, refer to the TDG discussion.

Ice Harbor

Summer 2005 Objectives: The original objective, to compare the migration behavior and survival of fall Chinook passage through BiOp spill (with large gate openings) with passage through the RSW (approximately 30% spill), will be conducted under the revised summer operation. This study uses radio telemetry and hydroacoustics methodologies.

Spill Duration: June 20 - August 31

Study Duration: June 9 – July 21

Spill Pattern During Study Period (June 9 - July 21): The study design is an alternating pattern of RSW spill and BiOp spill. See Table 5. These patterns will be alternated in accordance with the schedule provided in Table 6.

Spill Pattern After the Study Period (July 21 – August 31): Following the research period, project operation will be a minimum of one unit operation with spill to the gas cap following the spill to the gas cap pattern used in the study. See Table 5.

Table 5.
IHR "RSW" Treatment for Summer Spill
Pattern, 2005.

Project Discharge (kcfs)	Powerhouse (kcfs)	Spillbays (stops)										Total Spill (kcfs)
		1	2	3	4	5	6	7	8	9	10	
18.4	9.5	RSW								0		8.9
20.1	9.5	RSW								0	1	10.6
21.8	9.5	RSW	0							1	1	12.3
23.6	9.5	RSW	2							0	1	14.1
25.3	9.5	RSW	2							1	1	15.8
26.9	9.5	RSW	5							0	0	17.4
28.6	9.5	RSW	5							0	1	19.1
30.3	9.5	RSW	5							1	1	20.8
32	9.5	RSW	5							1.5	1.5	22.5
33.8	9.5	0	RSW	5						2	2	24.3
35.4	9.5	5	RSW	5						0	0	25.9
37.1	9.5	5	RSW	5						0	1	27.6
38.8	9.5	5	RSW	5						1	1	29.3
40.5	9.5	5	RSW	5						1.5	1.5	31.0
42.2	9.5	5	RSW	5		0				2	2	32.7
43.9	9.5	5	RSW	5		5				0	0	34.4
45.6	9.5	5	RSW	5	0	5	0	0	0	0	1	36.1

IHR "Gas Cap" Summer Spill Pattern, 2005

Project Discharge (kcfs)	Powerhouse (kcfs)	Spillbays (stops)										Total Spill (kcfs)
		1	2	3	4	5	6	7	8	9	10	
17.9	9.5	0		5							0	8.4
19.7	9.5	0		5						0	1	10.2
21.4	9.5	0		5						1	1	11.9
23.1	9.5	0		5						1.5	1.5	13.6

24.8	9.5	0	5	0		2	2	15.3
26.4	9.5	0	5	5		0	0	16.9
28.1	9.5	0	5	5		0	1	18.6
29.8	9.5	0	5.5	5.5		0	1	20.3
31.5	9.5	0	5.5	5.5		1	1	22.0
33.2	9.5	0	5.5	5.5	0	1.5	1.5	23.7
34.8	9.5	0	5	5	5	0	0	25.3
36.5	9.5	0	5	5	5	0	1	27.0
38.2	9.5	0	5.5	5.5	5	0	1	28.7
39.9	9.5	0	5.5	5.5	5.5	0	1.5	30.4
41.5	9.5	0	6	6	6	0	1	32.0
43.3	9.5	0	5	5	5	5	0	33.8
45.0	9.5	0	0	5	0	5	0	35.5

Table 6.
IHR 05 Treatment Schedule

Date	Block #	Treatment	Date	Block #	Treatment
8-Jun	12	RSW	30-Jun	17	RSW
9-Jun	12	RSW	1-Jul	17	RSW
10-Jun	12	Gas Cap	2-Jul	18	Gas Cap
11-Jun	12	Gas Cap	3-Jul	18	Gas Cap
12-Jun	13	RSW	4-Jul	18	RSW
13-Jun	13	RSW	5-Jul	18	RSW
14-Jun	13	Gas Cap	6-Jul	19	Gas Cap
15-Jun	13	Gas Cap	7-Jul	19	Gas Cap
16-Jun	14	Gas Cap	8-Jul	19	RSW
17-Jun	14	Gas Cap	9-Jul	19	RSW
18-Jun	14	RSW	10-Jul	20	Gas Cap
19-Jun	14	RSW	11-Jul	20	Gas Cap
20-Jun	15	RSW	12-Jul	20	RSW
21-Jun	15	RSW	13-Jul	20	RSW
22-Jun	15	Gas Cap	14-Jul	21	RSW
23-Jun	15	Gas Cap	15-Jul	21	RSW
24-Jun	16	RSW	16-Jul	21	Gas Cap
25-Jun	16	RSW	17-Jul	21	Gas Cap
26-Jun	16	Gas Cap	18-Jul	22	Gas Cap
27-Jun	16	Gas Cap	19-Jul	22	Gas Cap
28-Jun	17	Gas Cap	20-Jul	22	RSW
29-Jun	17	Gas Cap	21-Jul	22	RSW

McNary

Revised Summer 2005 Objectives: Estimate migration behavior, project and route specific survival of fall Chinook through McNary Dam under the revised summer 2005 operation using radio telemetry.

Spill Duration: July 1 - August 31

Study Duration: July 1 – July 31. This study has been split into two components, a non-spill phase that takes place before July 1st, the start of summer spill and a spill evaluation starting on July 1st.

Spill Pattern During Study Period (July 1 - July 31): The spill pattern developed in the Fish Passage Plan will be used for the start of the study. See Table 7. This pattern will be confirmed with field observation. Dependent of the field observations, changes will be coordinated through the regional forums.

Spill Pattern After Study Period (July 31 – August 31): The spill pattern used during the study period will be continued through the remainder of the summer spill operation.

Table 7.

McNary tentative summer spill pattern, 2005, based on the spring pattern in the fish passage plan.

Project Discharge (kcfs)	Powerhouse (kcfs)	Spillbays (stops)																						Total Spill (kcfs)
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	
53.9	50																			2	0			3.9
57.8	50																			2	2			7.8
59.5	50																		0	3	3			9.5
61.7	50																		2	2	2			11.7
63.4	50																	0	2	3	3			13.4
65.6	50																	2	2	2	2			15.6
67.3	50															0		2	2.5	3	2			17.3
69.5	50															2		2	2	2	2			19.5
71.2	50											0				2		2	2.5	3	2			21.2
73.4	50											2				2		2	2	2	2			23.4
75.1	50										0	2				2		2	2.5	3	2			25.1
77.3	50										2	2				2		2	2	2	2			27.3
79.0	50								0		2	2				2		2	2.5	3	2			29.0
81.2	50								2		2	2				2		2	2	2	2			31.2
82.9	50							0		2	2	2				2	0	2	2.5	3	2			32.9
85.1	50							2		2	2	2				2	2	2	2	2	2			35.1
86.8	50				0			2		2	2	2				2	2	3	2	3	2			36.8
89.0	50				2			2		2	2	2				2	2	2	2	2	2			39.0
90.7	50				2			2		2	2	2				2	2	3	2	3	2			40.7
92.9	50				2			2		2	2	2				2	2	2	2	2	2			42.9
94.6	50				2			2		2	2	2		0		2	2	3	2	3	2			44.6
96.8	50				2			2		2	2	2		2		2	2	2	2	2	2			46.8

98.5	50			2	2	2	2	2	2	2	2.5	2	2.5	2	2	0	48.5
100.7	50			2	2	2	2	2	2	2	2	2	2	2	2	2	50.7
102.4	50			2	2	2	2	2	2	2	2.5	2	2.5	2	2	0	52.4
104.6	50			2	2	2	2	2	2	2	2	2	2	2	2	2	54.6
106.3	50			2	2	2	2	0	2	2	2	2.5	2	2.5	2	2	56.3
108.5	50			2	2	2	2	2	2	2	2	2	2	2	2	2	58.5
110.2	50			2	2	2	2	2	2	2	2.5	2	2.5	2	2	2	60.2
111.9	50			2	2	2	2	2	2	3	2	2.5	2	2.5	2	3	61.9
113.6	50			2	2	2	2	2	2	3	2	2.5	3	2.5	2	3	63.6
115.3	50			2	2	2	2	2	2	3	3	2.5	3	2.5	3	3	65.3
117	50			2	2	2	2	2	3	3	3	2.5	3	2.5	3	3	67.0
118.7	50			2	2	2	3	3	3	3	3	2.5	3	2.5	3	3	68.7
120.4	50	0	0	0	0	2	0	2	0	2	0	3	3	3	3	3	70.4
121.3	50	2	3.5	3.5	2	2	2	2	2	2	2	2	2	2	2	0	71.3
123.0	50	2	3.5	3.5	3	2.5	3	2	2	2	2	2	2	2	2	0	73.0
124.7	50	2.5	3.5	3.5	3	2.5	3	2	2	2	2	2	2	2	2	0	74.7
126.3	50	2.5	4	4	3	2.5	3	2	2	2	2	2	2	2	2	0	76.3
128.0	50	2.5	4	4	3	2.5	3	3	3	2	2	2	2	2	2	0	78.0
129.6	50	2.5	4.5	4.5	3	2.5	3	3	3	2	2	2	2	2	2	0	79.6
131.3	50	2.5	5	5	3	2.5	3	3	3	2.5	3	2	2	2	2	0	81.3
132.9	50	2.5	5	5	3	2.5	3	3	3	2.5	3	2	2	2	2	0	82.9
135.1	50	2.5	5	5	3	2.5	3	3	3	2	2	2	2	2	2	0	85.1
136.8	50	2.5	5	5	3	2.5	3	3	3	2.5	3	2	2	2	2	0	86.8
138.5	50	2.5	5	5	3	2.5	3	3	3	2.5	3	3	3	2	2	0	88.5
140.2	50	2.5	5	5	3	2.5	3	3	3	2.5	3	3	3	2	3	2	90.2
142.4	50	2.5	5	5	3	2.5	3	3	3	2.5	3	3	3	2	2	2	92.4
144.1	50	2.5	5	5	3	2.5	3	3	3	2.5	3	3	3	2	3	2	94.1
145.8	50	2.5	5	5	3	2.5	3	3	3	2.5	3	3	3	3	2	3	95.8
148.0	50	2.5	5	5	3	2.5	3	3	3	2.5	3	3	3	2	3	2	98.0
149.7	50	2.5	5	5	3	2.5	3	3	3	2.5	3	3	3	2	3	2	99.7
151.4	50	3	5	5	3	2.5	3	3	3	2.5	3	3	3	3	2	3	101.4

Summary

As noted above, based on the coordination within the Regional Forum since the order was issued, the Corps is recommending the modifications as described for the summer spill operations at the lower Snake River and McNary projects. Operating these projects to stay within the state variances for TDG and implementing biological research testing as proposed, will only slightly modify the court ordered spill operations. These adjustments will provide valuable information on fall Chinook passage, and the Corps believes will improve juvenile survival.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1**

Case No. 05-35569

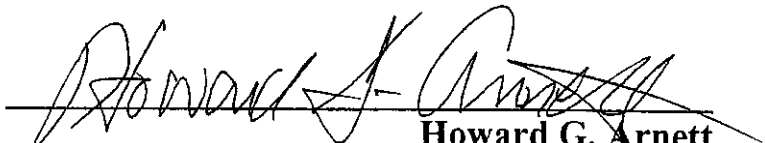
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June 30, 2005
Date

CERTIFICATE OF SERVICE

Copies of the foregoing Treaty Tribes' Joint Motion for Leave to File an *Amicus Curiae* Brief and Treaty Tribes' Joint *Amicus Curiae* Brief In Support of the District Court's Injunction, Opinion and Order, were served on the following counsel of record on June 30, 2005, by Federal Express, Express Mail or first class U.S. Mail:

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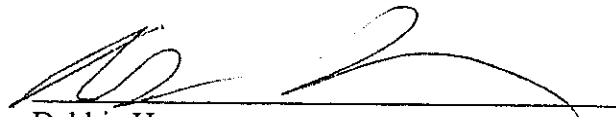
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